# In the Supreme Court of the United States

OCTOBER TERM, 1975

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No. 75-768

SCOTT BURGWIN, ET AL., PETITIONERS

*v.*

JULIUS J. MATTSON, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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On March 24, 1973, respondents, special agents of the Federal Bureau of Investigation, arrested petitioners for allegedly violating 18 U.S.C. 2101 by transporting food and supplies with the intention of taking them to Wounded Knee, South Dakota, for the purpose of assisting members of the American Indian Movement who were forcibly occupying that area. Following their arrests, petitioners were released on their own recognizance. On March 26, 1973, the government filed a complaint charging petitioners with violating 18 U.S.C. 2101. The complaint was dismissed the following day (Pet. App. A1-A2, A7).

In April 1973, petitioners commenced this action for money damages, alleging that respondents had violated their constitutional rights by the arrest. On June 26, 1973, respondents moved for dismissal of the complaint or, in the alternative, summary judgment. The motion was supported by respondents' affidavits and by affidavits of the

United States Attorney for the District of Oregon and his First Assistant, which set out the facts surrounding petitioners' arrest and the information upon which the decision to arrest had been based.

On August 8, 1973, petitioners filed an opposition to respondents' motion but failed to support it by affidavits or any other evidentiary material. Petitioners made no attempt to depose respondents or to seek discovery prior to September 12, 1973, when the court heard argument on the motion.

On November 1, 1973, the district court granted respondents' motion for summary judgment. The court found that there had been probable cause for the arrest and that defendants had acted in good faith within the scope of their official duties. The court specifically noted that although plaintiffs had had ample opportunity to respond to defendants' motion for summary judgment and to seek discovery prior to the hearing, they had failed to do so (Pet. App. A12-A14).

The court of appeals affirmed on the ground that respondents' affidavits presented facts that on their face entitled them to summary judgment and petitioners had not demonstrated "that a triable dispute existed as to those facts" (Pet. App. A3).

The judgment of the court of appeals is correct and presents no issue warranting further review. Respondents' detailed affidavits indicated the basis for the arrests. Petitioners offered no facts to contradict the affidavits or to draw into question respondents' assertions of good faith.

In the face of respondents' motion and affidavits, petitioners were not entitled to rely on the conclusory allegations of their complaint. Rule 56(e), Fed. R. Civ. P., provides in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JANUARY 1976.